REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: A843/2014

14/12/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

..... 14.12.2016
SIGNATURE DATE

In the matter between:

SIMON MAYISHANE MOSOMA Appellant

and

THE STATE Respondent

J U D G M E N T

MSIMEKI J.

INTRODUCTION

[1] On 21 May 2010, the appellant appeared before Matojane J, charged with:

Count 1: Murder,

Count 2: rape; and

Count 3: Robbery with aggravating circumstances.

[2] He, on the same day, pleaded guilty to the charges and the Court *a quo* sentenced him as follows:

1. Murder: 25 years imprisonment;
2. Rape: 16 years imprisonment;
3. Robbery with aggravating circumstances: 8 years imprisonment.

4 years of Count 3 were ordered to run concurrently with the 16 years on Count 2. Effectively, the appellant was sentenced to 45 years imprisonment.

[3] On 6 August 2013 the appellant applied for leave to appeal against the sentence. The Court *a quo* acceded to the application and granted the appellant the leave that he applied for. The appellant, in the main, is appealing against the sentence.

[4] Advocate J. Van Vuuren and Mr Kgakgara represented the State and the appellant when the appeal was argued.

[5] The appeal, in a nutshell, is based on the ground that the sentence is severe and inappropriate.

BRIEF BACKGROUND FACTS

[6] The deceased and the appellant worked for the same employer, the deceased as a domestic worker and the appellant as a gardener. The two, prior to the incident that led to this case, had a misunderstanding which developed into an altercation. The appellant, after the incident, relocated to Dennilton where he committed an offence which resulted in his being sentenced to a term of imprisonment. Upon his release from jail, after serving 9 months, the appellant decided to go to his employer to get the deceased to apologise for her conduct which, according to him had been offensive. The deceased did not take the appellant's approach kindly. She was upset. The appellant took a garden fork from the garage and stabbed the deceased therewith in her back. He then forced the deceased into the garage where he proceeded to assault her by trampling on her. He raped the deceased who, at the time, was bleeding. The appellant thereafter hit the deceased on her head with an iron rod and left her for dead. In the process, the appellant, before leaving, stole the items which are listed in the indictment. A panel of three senior specialist psychiatrics, in the employ of Mankweng Hospital in Polokwane, after observing the appellant, found him fit to stand trial and being a person who had the capacity to appreciate the wrongfulness of his actions when the offences were committed. He was found not to be mentally impaired or having any mental defect.

[7] The appellant called Dr Chabalala, a psychiatrist, to testify in mitigation of the sentence which the Court *a quo* was to pass.

THE APPELLANT'S PERSONAL CIRCUMSTANCES

[8] The following personal circumstances are worth noting.

1. The appellant was 32 years old when he committed the offences;

2. He was not married and had no children;

3. His highest level of education was standard 2;

4. The appellant did odd jobs, such as car painting, brick making and gardening;

5. The appellant spent 4 years in custody awaiting trial;

6. He pleaded guilty and did not waste the Court *a quo's* time;

7. He is remorseful and sorry for what he did and apologised to the deceased's family members, the community and the Court.

[9] In **S v Pieters 1987 (3) SA 717 (A) at 720C** the Court said:

"The Appellate Division will not lightly substitute its own judgment regarding a suitable sentence for that of a trial Judge."

At 720E the court further said:

> *"...It is essential to stress that the final, crucial question still remains: could the trial Judge reasonably have imposed the death sentence? It would accordingly only make sense for the Appellate Division to put it on record that it would not have imposed the death penalty in the first instance, if the circumstances of the case were of such a nature that that finding leads to the further finding that the Appellate division is convinced that the trial Judge could not reasonably have imposed the death penalty."* (my emphasis).

[10] Webster J in **S v Makena 2011 (2) SACR 294 at [13]** said:

> *"What has been said about rehabilitation and reformation applies to the period of the appellants' rehabilitation viewed from the appropriateness or otherwise of the imprisonment for fifty (50) years. It is my considered view based on the sentences emanating from the Supreme Court of Appeal that effective sentences exceeding 25 years' imprisonment are not confirmed lightly. Again the basis for this may be the emphasis on reformation and rehabilitation, based inter alia on the constitutional precepts that punishment should not be cruel or be deemed to be such. This statement is made with the full knowledge and appreciation of the gravity and devastating effects that the loss of the victim's life has inevitably inflicted on his family, society and the country. The need to have regard for a convicted person's personal circumstances serve precisely to balance the principles that must be considered when sentencing..."* (my emphasis).

[11] In **S v Rabie 1975 (4) SA (A) 855 at 857D-E** Holmes JA said:

"1. *In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

"2. *The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".* (my emphasis).

[12] Scott JA in **S v Kgosimore 1999 (2) SACR 238 (SCA) at 241 [10]** said:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare S v Pieters 1987 (3) SA 717 (A) at 727G-I).

Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so." (my emphasis).

[13] The Court, dealing with the purpose of punishment, in **S v Rabie (*supra*) at 862A** said:

"(f) The main purpose of punishment are deterrent, preventive, reformative and retributive" (my emphasis).

Again at **862G in S v Rabie (*supra*)**, Holmes JA said:

""To sum up: in general: Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances". (my emphasis).

[14] Mr Van Vuuren submitted that the case was replete with aggravating circumstances which the trial Court had duly considered. These, according to him, are:

1. That the offences were prevalent in the area;

2. That the offences were serious with the level of violent offences being high in the country;

3. The interests of society;

4. The fact that the deceased was a vulnerable victim who was incapable of defending herself against the appellant;

5. That the death of the deceased impacted very badly on her family;

6. That the appellant did not care about the well-being of the deceased whilst he raped her and satisfying his own needs i.e.: whether she bled to death or not;

7. That the injuries that the deceased sustained were very serious.

[15] To counter Mr Kgakgara's submission that the time spent in custody, as it was held in **S v Vilikazi 2009 (1) SACR 552 (SCA)**, had to be considered, referred the Court to a later decision of the SCA: **S v Radebe and Another 2013 (2) SACR 165 (SCA) at [13]** where the Court said:

> *"[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also S v Seboko 2009 (2) SACR 573 (NCK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful."*

At [14], the court said:

> *"[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime*

committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Procedure Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one." (my emphasis).

[16] In **S v Matyityi 2011 (1) SACR 40 (SCA) at 47a-d**, when dealing with regret and remorse, the Court said:

"There is, moreover, a chasm between regret and remorse. Many accused persons well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition

alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions." (my emphasis).

[17] Mr Van Vuuren submitted that the appellant demonstrated no real contrition for his actions when he explained the events of the day in question to psychiatrists and the probation officer. It is said that the appellant was smiling when he narrated the events of the day to Dr. Chabalala. This, in my view, does not only mean that the appellant did not see what transpired in a serious light. This could also mean that the appellant is someone who genuinely needs medical as well as other relevant assistance. Surely, the appellant's behaviour leaves a number of things to be desired. In this regard, what happened concerning the deceased and himself speaks volumes. The facts of the case properly considered, in my view, clearly demonstrate that the appellant's behaviour in this case is no ordinary conduct. What the appellant did, after being away from the deceased for 9 months, should be clear enough that the appellant may well have behaved as Dr Chabalala explained in his report.

[18] Dr J Chabalala, a psychiatrist, examined the appellant after the conviction. According to Dr Chabalala the appellant is mentally retarded to a minor extent with features of anti-social personality

disorder, emotionally immature lacking empathy and with no emotional resource to control his anger. According to Dr Chabalala the appellant acted without thinking of the consequences.

[19] The probation officer, Muroa J. V. in the report which forms pages 125 to 131 of Volume 2 of the Court record at paragraph 18 discloses that:

"1. *It appears as if the accused lack a clear understanding of the consequences of his actions and often fails to take responsibility. He freely and confidently explained what transpired during the incident as if he had to defend himself even if it meant taking another person's life".* (my emphasis).

2. The appellant has no ability to control himself.

3. With intensive therapy the appellant *"can learn to respect human dignity, have self-control, to be assertive", to be able to "control his temper, realise his potentials, develop better conflict management skills and as such manage to live in peace with other people".* (my emphasis).

4. The appellant has skills such as brick making, gardening and painting which if improved might assist the appellant feel important.

[19] The three psychiatrists, Dr C. Grobler, Principal Specialist; Dr E Weiss, Chief Specialist and Dr J. J Bothma, Senior Specialist, after observing the appellant found that:

1. The appellant would be able to follow court proceedings;

2. Had no mental illness;

3. Was fit to stand trial and that he had the capacity to appreciate the wrongfulness of his action at the time of the alleged offence and his ability to act accordingly was not impaired by mental illness or defect.

[20] The evidence of Dr Chabalala and that of the Probation Officer is more or less the same. They, however, both saw the appellant at different intervals. The fact that the three psychiatrists found that the appellant would follow court proceedings and that he was fit to stand trial, in my view, does not negate Dr Chabalala's evidence as well as that of the Probation Officer. The facts of the case, in my view, seem to confirm the evidence. One should not stop the enquiry at the stage where it appears that the person interviewed knows what rape is because this, in my view, should not be enough. One does not easily come by the facts of this case where the appellant, indeed, behaved in a very strange way. One would have expected the appellant to have been satisfied with the fact that he had relocated. The altercation between the deceased and the appellant, under normal circumstances, ought

not to have led to the death of the deceased. The behaviour, in my view, seems to confirm the Probation Officer's observation as well as that of Dr Chabalala.

[21] Going back to Dr Chabalala's report, it is important to note that he describes the appellant as someone who:

1. is mentally retarded to a minor extent (Borderline retardation).

2. Has features of Antisocial Personality Disorder. The appellant according to him lacks empathy and is very reactionary over trivials. It appeared strange to Dr Chabalala that the appellant could get sexually aroused by a person who was lying on the floor and bleeding from her head and dying.

3. Lacked inner ego strength - the ability to take frustrations and move on as shown by his return 9 months later to avenge himself. He took advantage of the weak to bolster his ego where circumstances permit. This, according to Dr Chabalala, is borne out by the appellant getting sexually aroused when he saw a weak and defenceless deceased.

This is the kind of unusual behaviour I referred to above.

[22] Mr Van Vuuren submitted that the aggravating circumstances were such that the appeal ought to fail. I do not think that it is

enough to consider the aggravating circumstances and then submit as Mr Van Vuuren did; the tests laid down by our case law have to determine the outcome of an issue.

[23] The State relied on **Section 57 of Act 105 of 1997-the Criminal Law Amendment Act**. The sentence for murder, in terms of **Section 57**, is imprisonment for life. The Court *a quo*, as correctly submitted by Mr Kgakgara, did not make any finding regarding the presence of substantial and compelling circumstances or the absence thereof. It nevertheless did not pass the sentence of imprisonment for life or 15 years imprisonment in respect of robbery. One can only assume that the Court *a quo* had in its mind, the presence of substantial and compelling circumstances.

[24] The question that needs to be answered is whether or not the sentences in respect of the three counts are appropriate.

[25] It was argued on behalf of the respondent that the appellant was not remorseful. Mr Van Vuuren specifically said that the fact that the appellant regretted his actions and that he asked for forgiveness could not be viewed as remorse as that was "*arguable*". Being "*arguable*", in my view, does not mean that the appellant is not remorseful. It may well be so that the appellant, indeed, was genuinely remorseful. I do not think that there is

enough evidence to demonstrate that the appellant was not remorseful. Besides, the appellant pleaded guilty and this cannot be ignored when sentence is passed. The behaviour of the appellant is such that the Court needs to be very cautious when sentencing him.

[26] The Court *a quo* when granting leave to appeal against sentence said:

"*I have had an opportunity to look through the judgment again, I am of the view that another Court may arrive at a different sentence and accordingly leave to appeal against sentence is granted to the Full Bench of this Division.*" (my emphasis).

This clearly shows that the Court *a quo*, simply by reason of the severity of the sentence, at the very outset realised that the sentence induced a sense of shock. The effective sentence of 45 years, in my view, is disturbingly inappropriate.

[27] Having concluded that the Court a quo avoided passing the minimum sentences possibly because it was satisfied that substantial and compelling circumstances existed the question which then comes to mind is whether the sentences are appropriate.

[28] Having regard to the fact that the appellant was in custody for 4 years awaiting trial; the fact that he pleaded guilty and apologised to the Court, the family members of the deceased and the community; the fact that the three offences arose from acts of the same place and date and that the offences are closely linked, as correctly submitted by Mr Kgakgara, to mitigate the severity of the cumulative effect of the sentences, the Court *a quo* ought to have ordered that the three sentences run concurrently. Regard being had to the facts of the case particularly what I say in this paragraph, the sentences in Counts 1 and 2 deserve to be tampered with.

[29] The Court *a quo*, in its judgment on sentence, expressed the wish to mitigate the harshness of the cumulative effect of the sentences but, unfortunately ordered that *"4 years of the sentence imposed in respect of Count 3 shall run concurrently with the sentence imposed in respect of count 2"*. This, in my view, did not help in any way as the effective sentence remained disturbingly inappropriate. The sentences in respect of murder and rape deserve to be reduced. The appeal against sentence should therefore be upheld.

ORDER

[30] **The following order is made:**

1. **The appeal against sentence is upheld.**

2. **The sentence in Count 1 is set aside and replaced as follows:**

   "The accused is sentenced to 22 years imprisonment".

3. **The sentence in Count 2 is set aside and replaced as follows:**

   "The accused is sentenced to 12 years Imprisonment".

4. **The sentence in Count 3 is confirmed.**

5. **To mitigate the harshness of the cumulative effect of the sentences, it is ordered that the sentences in Counts 1, 2 and 3 shall run concurrently. Effectively, the appellant shall serve 22 years imprisonment.**

6. **The sentences are antedated to 21 September 2011, the date of sentence by the Court *a quo*.**

I agree,

M. W. MSIMEKI
JUDGE OF THE HIGH COURT

A. M. L. PHATUDI
JUDGE OF THE HIGH COURT

I agree,

C. P. RABIE
JUDGE OF THE HIGH COURT

DATE HEARD: 14 AUGUST 2015

DATE OF JUDGMENT: 14 DECEMBER 2016

FOR THE APPELANT: MR M. B KGAGARA

FOR THE RESPONDENT: ADV. M. J. VAN VUUREN